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No. 97-2020

In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

vs.

NEW YORK MAGAZINE,
A DIVISION OF PRIMEDIA MAGAZINES INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Metropolitan Transportation Authority ("MTA") was properly preliminarily enjoined from refusing to display an advertisement on the outside of New York City buses as per contractual agreement, when the MTA (i) had opened that advertising space for all categories of speech, both political and commercial; (ii) acted without any procedural safeguards, in contravention of its own regulations, and solely because of the complaint of the Mayor of New York City; and (iii) acted solely on the grounds that that advertisement *may* violate the Mayor's personal rights under a state statute?

PARTIES TO THE PROCEEDINGS

The Petition accurately lists the parties to the proceeding.

PRIMEDIA Magazines Inc. is a wholly-owned subsidiary of K-III Prime Corporation, which is a wholly-owned subsidiary of PRIMEDIA Inc., which is a publicly owned and held corporation.

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APPENDIX

Appendix A — Board Resolution 1a

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This is an action brought pursuant to 42 U.S.C. § 1983 (1998) which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The MTA enacted certain regulations with respect to advertisements on the outside of city buses, a copy of which is Appendix A hereto.

Also pertinent to this action is N.Y. Civ. Rights Law § 50 (McKinney 1998), reproduced as part of Appendix A hereto.

STATEMENT

Respondent *New York* Magazine, a division of PRIMEDIA Magazines Inc. ("*New York* Magazine") respectfully opposes this Petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Second Circuit issued on January 22, 1998, affirming the grant of a preliminary injunction restraining Petitioner The Metropolitan Transportation Authority ("MTA") from refusing to display an advertisement on the outside of New York City buses. That advertisement juxtaposed the words "Possibly the Only Good

Thing About New York Rudy Hasn't Taken Credit For", next to the name and logo of *New York* Magazine (the "Advertisement").

A. Statement of the Case

This is an action brought by *New York* Magazine against the MTA as a result of the MTA's summary, extra-regulatory, extra-contractual and unconstitutional refusal to display the Advertisement on the outside of city buses; notwithstanding the uncontroverted facts that the MTA was acting under color of state law, had contracted with *New York* Magazine to post the Advertisement, and the Advertisement had been approved over a month in advance of scheduled display pursuant to the applicable agency regulations; solely because of a telephone call from the office of the Mayor complaining about the Advertisement; without advance notice to *New York* Magazine or affording it any opportunity to object to this deprivation of its First Amendment rights.

To read the MTA's petition, one would believe that this action was a facial challenge to the constitutionality of the applicable MTA regulatory scheme. It is not. Both the District Court and the Court of Appeals held that *New York* Magazine had satisfied its burden of proof sufficiently to warrant the grant of a preliminary injunction on its claim pursuant to 42 U.S.C. § 1983.

To read the MTA's petition, one would also believe that the MTA had developed a full record below as to the governmental purposes underlying its regulatory scheme, that that scheme had been followed, and that the limitations it was seeking to impose upon speech were justified — not just by the whim of a mercurial mayor — but by a legitimate and substantial governmental interest. To the contrary, the record is devoid of

any governmental interest underlying the MTA's action, not to speak of a substantial one, and whether the regulations in issue are or are not either reasonable or narrowly tailored, they simply were not followed.

It is not hard to fathom why both courts below issued the relief requested: whether the Advertisement is viewed as pure commercial or core speech and whether or not the outside of city buses are a designated public forum, the MTA failed to carry its heavy burden of justifying the imposition of a prior restraint against *New York* Magazine's exercise of its First Amendment right to poke fun of or to criticize the Mayor of the City it covers.

Because of: (1) the preliminary nature of this proceeding; (2) the paucity of the record created by the MTA; (3) the preliminary injunction standard; and (4) the fact that the decision of the court below is fully consonant with the applicable Supreme Court precedents; review of this decision at this juncture is wholly unwarranted.

B. Statement of Facts

New York Magazine is a weekly publication, published continuously since 1968, which covers events, happenings, people and politics in and around the greater New York City metropolitan area. J.A. 26.[1] The magazine regularly and prominently includes political commentary and, almost weekly, includes some mention or discussion of the Mayor of the City of New York, Rudolph Giuliani, who is widely known as "Rudy". Pet. App. 23a. Over the years, it has published dozens

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1. Citations to the Joint Appendix below are in the form of J.A. __; citations to the Petition are in the form of Pet. __; citations to the Appendix to the Petition are in the form of Pet. App. __; and citations to the Appendix hereto are in the form Opp. App. __.

of articles about the Mayor; these articles have been both critical and complimentary. J.A. 26. Immediately prior to the events in issue and following his November 1997 victory in the most recent mayoral election, Giuliani was caricatured on a November 10 *New York* Magazine cover story. *Id.*, 126-134. His penchant to claim credit for everything positive which has occurred in the City was a prominent issue in that election campaign and was part of that cover story. *Id.*

The Advertisement was the subject of a short-form contract, entered between *New York* Magazine and Transportation Displays, Incorporated ("TDI"), the contracting agent for the MTA, effective September 29, 1997 (the "Agreement"). J.A. 30-31. Under the Agreement, *New York* Magazine was to provide physical copies of the Advertisement by November 15, "so that postings will go up before Thanksgiving. . . ." *Id.* The Agreement is conditioned upon, *inter alia*: "approval of TDI and the [MTA] . . . as to character, text, illustration, design and operation" of advertising copy (*id.*, ¶ III.a); and *New York* Magazine's agreement to indemnify and hold harmless TDI and the MTA against any resultant liability (*id.*, ¶ VI.a). There are MTA regulations regarding advertising on city buses (the "Standards"). Those Standards provide, *inter alia*, that the MTA may decline to post an advertisement that *may* violate § 50 of the New York Civil Rights Law ("§ 50"), which proscribes, *inter alia*, the use of a person's name for trade or advertising purposes and prohibits non-consensual commercial endorsements. Opp. App. 15a.

After the Agreement was accepted in late September and in the midst of the mayoralty campaign, the Advertisement was conceived and selected as the centerpiece of *New York* Magazine's new advertising campaign. J.A. 27. Sometime during the week of October 17, it was submitted to TDI for approval under the terms of the Agreement and was approved that same

week. *Id.*, 25, 117. Five weeks later, the Advertisement was printed and timely delivered. J.A. 25, 117. The weekend it was scheduled to be posted on city buses, Mayor Giuliani guest-hosted the nationally-televised NBC television network satiric comedy "*Saturday Night Live*" dressed in drag. J.A. 34. Amidst accounts of that performance, the press first reported that the Deputy Mayor had demanded that the MTA kill the Advertisement and that the MTA Chairman had complied (*id.*, 32-33, 25), presumably on the grounds that it violated the Mayor's rights under § 50 (*id.*, 76-77). Far from an express or implied non-consensual commercial endorsement, the Advertisement expressly states that the Mayor does *not* take credit for the product, *i.e.*, *New York* Magazine. *Id.*, 135; Pet. App. 39a.

The MTA did not notify *New York* Magazine of its change of position, nor did it afford the Magazine an opportunity to object or respond. When *New York* Magazine learned from the press reports of the MTA's action, it called the MTA and was orally advised that the Advertisement had been pulled at the "request" of the "Mayor's Office". J.A. 26. Pursuant to the very Standards on which the MTA relied to kill the Advertisement, it was obligated to provide prompt written notice of a decision not to approve an advertisement and the reasons therefor, and to afford the advertiser an opportunity to object to that determination and explain the reasons for its objection. *Id.*, 140, ¶ (c)(i). Obviously, since this Advertisement was approved without objection over five weeks prior to the MTA's summary action, the MTA's action was taken neither pursuant to regulation, nor in conformity with it.

In the face of this advice, *New York* Magazine filed suit on affidavits setting forth what had transpired, seeking a preliminary injunction against the MTA and the City of New York under, *inter*

alia, 42 U.S.C. § 1983.[2] *Id.*, 4-28. At the hearing on that application, neither the City nor the MTA submitted any factual record, whether by affidavit or testimony, apart from two advisory opinions with regard to Chapter 68 of the City Charter (*id.*, 171-172, 175-176), and a stipulation regarding the on-sale date of the November 10, 1997 issue of the Magazine (*id.*, 118, 125). *New York* Magazine's uncontroverted supporting affidavits were admitted (*id.*, 118), together with certain stipulations, including the fact that the MTA accepts both political and commercial advertisements for display on City buses (*id.*, 81-82), as well as certain exhibits, including the Standards (*id.*, 119).[3]

C. The Decisions Below

The District Court granted the preliminary injunction, finding that the outside of New York City buses were a designated public forum (Pet. App. 37a); the Advertisement was commercial speech (*id.*, 33a); therefore, the critical question was whether the MTA had a substantial interest justifying refusal to post the Advertisement (*id.*, 35a); and because the Advertisement did not violate § 50 under the judicially-crafted newsworthiness and incidental use exceptions to that statute, the MTA had no such substantial interest (*id.*, 45a).

On appeal, the Second Circuit did not reach either the issue of whether the Advertisement violated the Mayor's commercial privacy rights, or the issue of whether the Advertisement should be treated as commercial speech. It held that it was not required

2. The City was later dismissed as a party by the Court of Appeals. Pet. App. 5a-6a.

3. There was some dispute as to the applicability and admissibility of new MTA regulations, effective September 30, 1997, after the effective date of the Agreement. Those new regulations expressly state they apply only to "future contracts". J.A. 148. As noted by the Court of Appeals, this issue is irrelevant to these proceedings. Pet. App. 4a n.1.

to reach these issues because the MTA, having opened the advertising space on the outside of city buses for all categories of speech, whether commercial or political, could not summarily and without any procedural safeguards exclude speech within those permitted categories, simply because that speech *may* violate an individual's commercial privacy rights. *Id.*, 14a-15a. The kind of limitations included in the Standards cannot be bootstrapped to define the nature of the forum; they must be justified as exclusions narrowly tailored to serve a compelling governmental interest. *Id.*, 10a-11a. Finding neither a compelling governmental interest nor narrow tailoring to advance same, the Court affirmed. *Id.*, 13a-14a. Alternatively, the Court found that the Advertisement could not withstand the intermediate scrutiny applied to pure commercial speech. *Id.*, 14a. A Petition for Rehearing and for Rehearing *En Banc* was thereafter denied. *Id.*, 50a.

REASONS FOR DENYING THE WRIT

The parade of horribles posited by the MTA in support of this petition is neither supported by the evidentiary record, nor particularly relevant to the facts of this case, nor accurate. Far from imposing "a wholly unmanageable regime" (Pet. 6); "throw[ing] an important area of First Amendment law into confusion" (*id.*, 7); or "requiring wholesale revision of the policies of countless public agencies" (*id.*); the decision of the court below did no more in *this case* than to require the MTA to post a humorous advertisement, which has long since had its "run", and does no more as a future precedent than compel the MTA to articulate standards for refusing advertisements in a manner consistent with the longstanding holdings of this Court.

I.

THE PROCEDURAL POSTURE OF THIS CASE MILITATES AGAINST REVIEW BY THIS COURT.

This Court's well-established practice is to exercise its certiorari jurisdiction "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). None of those circumstances are presented by this case, which involves a straightforward application of this Court's existing precedents to a unique set of facts. Although petitioner attempts valiantly to cast the issues presented here as ones with dramatic consequences for "government at all levels" (Pet. 1), the affirmation of this preliminary injunction only has meaningful application in this specific case: the MTA decides whether to exclude advertisements on a "case-by-case basis" (*id.*, 8), and respondent has not brought a facial challenge to the MTA's Standards.

In addition, this case involves an interlocutory order, which this Court normally does not review unless "[n]ecessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause". *American Constr. Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384 (1893). The disfavored status of review at this stage is, in part, a product of the largely undeveloped state of the record. As this Court has stated:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary . . . a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Here, the record is virtually devoid of any factual underpinning for petitioner's claims of governmental purpose or for its predictions of dire consequences. Also militating against review at a preliminary stage is the possibility of duplicate applications to this Court after a full record has been developed at trial.

In short, nothing about the legal principles involved in this case justifies granting of the writ and strong policy measures caution against it.

II.

THE PUBLIC FORUM ANALYSIS OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

The MTA and *New York* Magazine agree that the MTA, as a government actor, cannot unconstitutionally deprive the Magazine of its First Amendment rights on public property. They disagree however as to whether it has done so here. That disagreement stems from a disagreement as to the proper standard of review of the MTA's decision to kill the Advertisement. The Court of Appeals properly considered and applied this Court's public forum precedents to find that the MTA's action was unconstitutional. None of the strained interpretations of existing law offered by petitioner justifies further review of that determination.

1. This Court has emphasized that the first question in classifying a forum under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and, indeed, the determinative question, is the intent of the government in operating that forum, *i.e.*, the intent to open non-traditional spaces for the benefit of the public discourse. *Cornelius v.*

NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985). This inquiry requires an analysis of both the nature of the government property and the nature of the restraints on the forum. *Id.* Examining the "intent" of the MTA on the basis of the limited record here is, of necessity, somewhat constrained. The MTA, which bears the burden of proof, relies solely on self-serving argument. In fact, the record on point consists solely of the stipulation that the MTA permits all commercial and political speech on the outside of city buses, and the objectives of the MTA set forth in the Standards (or, rather, in the Board Resolution which accompanies them). These two sources support the conclusion, particularly for preliminary injunction purposes, that the MTA intended to open a public forum.

A key question in determining *both* the nature of the government property and the nature of the government restraints is whether the government is acting in a regulatory or proprietary capacity in operating the forum. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"). As the Second Circuit noted here, the fact that the MTA allows political speech serves to underscore the conclusion that the MTA operates the outside of the city buses in a regulatory, rather than a proprietary capacity, and thus intended to open the space to the public at large:

> Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice.

Pet. App. 11a.

The conceded fact that the MTA does not restrict that advertising space by excluding any "categories" of speech sharply distinguishes this case from both *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) and *ISKCON*, the two authorities on which petitioner places primary reliance. In each of those cases, and indeed, in all of the Supreme Court cases assessing like public fora, distinct "categories" of speech or expressive conduct were excluded, leading to the logical conclusion that the government did not intend to commit the space to all manner of expressive activity. *See Lehman*, 418 U.S. at 303-4 (political speech excluded from forum);[4] *ISKCON*, 505 U.S. at 685 (solicitation and distribution excluded from forum); *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (solicitation excluded from forum).[5] *Contrast Widmar v. Vincent*, 454 U.S. 263 (1981) (public forum found where school facilities open generally to all students for all categories of speech); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (public forum found where municipal theater "designed for and dedicated to" expressive activities).

Likewise, the Standards militate in favor of finding a designated public forum based upon the MTA's role as "regulator". Certainly the Board resolution authorizing those Standards includes reference to the orderly operation of the transit system to generate revenue, but just as certainly and far more pervasively, it recites the "compelling interests" of

4. Further distinguishing *Lehman*, that case involved advertising on the *interior* of city buses and therefore the "risk of imposing on a captive audience" was of serious concern. *Lehman*, 418 U.S. at 304. The ad space here is not such a "captive forum".

5. The same is true of *Rogers v. New York Transit Auth.*, 89 N.Y. 2d 692, 657 N.Y.S. 2d 871, 680 N.E. 2d 142 (N.Y. 1997), which the MTA deems irreconcilable with the Court of Appeals decision here. Pet. 18-19. There, the New York City Transit Authority precluded an entire category of expressive conduct, not a subset thereof.

protecting minors from "harmful" speech, avoiding connection with advertiser's viewpoints, and furthering the interests of patrons in avoiding advertisements which contain "offensive sexual material". Opp. App. 1a-2a, 13a. Thus, the stated purposes of the Standards and the alleged purpose of the standard under which the Advertisement was excluded, are the enforcement of state law. It is hard to fathom more direct evidence of the MTA'S regulatory intent in operating this forum.

To avoid designated public forum status notwithstanding the inclusion of all categories of speech, the MTA tries to fit within the rubric of *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998). There, this Court held that where access to the government property is very tightly regulated on a speaker-by-speaker basis within an "eligible" class of speakers, and there is no other "evidence of a purposeful designation for public use", no public forum exists. 118 S. Ct. at 1636-37 (quoting *Cornelius*, 473 U.S. at 805).[6] The MTA tries to create a selective class of "speakers" eligible to display ads on the outside of city buses, *i.e.*, "paying customers" who agree to abide by the Standards. Pet. 9. If a payment requirement alone suffices to define the nature of the forum, then any governmental fora which are accessible only by payment of a fee are, *ipso facto*, nonpublic. More to the point here, *New York* Magazine was within that self-serving "class" of speakers: it

6. Transposing *Forbes* onto the facts of this case would be ill-conceived because *Forbes* was not a typical public forum case; to the contrary, this Court extrapolated its public forum law into an area *never* traditionally considered to be a public forum because of the journalistic and editorial discretion necessarily granted broadcasters and the attendant countervailing First Amendment concerns. *Forbes*, 118 S. Ct. at 1639. As a result, the presumption in *Forbes* had to be *against* the finding of open access. As this Court recently noted in *Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n*, 518 U.S. 727, 747 (1996) (plurality opinion), engrafting traditional public forum analysis into new areas can create anomalous results.

paid for the advertising at stake, submitted it for approval and agreed to indemnify the MTA. Those are the only limitations imposed on the speaker, rather than the speech.

2. By virtue of the questions that the MTA asks this Court to review, it appears to concede that if the outside of city buses are a designated public forum as the above facts demonstrate, then the Standard upon which it supposedly acted here cannot survive either strict or intermediate scrutiny, as the courts below held. That concession is hardly surprising as none of the supposedly "compelling" interests articulated in the Standards so much as reference § 50, not to speak of providing a compelling interest in suppressing advertisements which "may" violate it.[7] To the extent the MTA argues that by its Standards it seeks to uphold the law in general, it offers no reason why it has singled out § 50 for particular enforcement beyond avoiding the expense of litigation under that statute. Pet. 16 n.9. And as the Court of Appeals noted, that collateral purpose is amply served by the indemnity provision in the Agreement. Pet. App. 12a.

3. To avoid the conclusion that the MTA's own actions opened the outside of city buses as a designated public forum and the consequent unconstitutionality of its action with respect to the Advertisement, petitioner argues that its Standards created a "limited" public forum (Pet. 16-18), *i.e.*, a forum open generally to the public for certain restricted categories of speech or limited to certain classes of speakers. There is nothing "limited" about a forum that allows all categories of speech.

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7. Even under intermediate scrutiny, the government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995); *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation Bd.*, 512 U.S. 136, 143 (1994).

The MTA nonetheless posits a "limitation" by arguing that the Standards define what it terms the "contours" of its forum. *Id.*, 8, 17. The MTA cannot use its regulations to define the limits — and therefore the nature — of its forum, because those limitations are limitations *within* a category of speech. Even the MTA concedes that one cannot discriminate within a category of speech to which a public forum has been opened, without satisfying strict scrutiny. *Id.*, 8.

The Court of Appeals was clearly correct in warning that the MTA's proffered analysis would work an impermissible end-run around the protections crafted by this Court and mandated by the First Amendment:

> [I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.

Pet. App. 10a (citations omitted). The MTA's construction blurs the difference between category exclusions and regulation within a category to the point of indistinction and suggests that any example of speech that the MTA excludes, no matter how constricted or narrowly defined, would be subject only to a review for reasonableness. By petitioner's reasoning, this forum should be defined as open to "all speech that does not, in the discretion of the MTA, potentially violate § 50". The MTA could, under this theory, exclude any advertisement in the "category" of "magazine promotions parodying the Mayor".

Yet petitioner acknowledges, citing *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995), that the government " 'must respect the lawful boundaries it has itself set' ". Pet. 17.

That content-based exclusions within an otherwise open forum cannot be used to bootstrap a determination that the forum is closed, is precisely the teaching of *Rosenberger*. There, applicants who published a religious newspaper were excluded from access to a university funding program that did not exclude the general subject matter of religion. The Court held unconstitutional the exclusion of "an entire class of viewpoints" as a means of circumventing strict scrutiny within a category of speech otherwise permitted in the forum. 515 U.S. at 831; *see also ISKCON*, 505 U.S. at 685 ("[I]f ISKCON is given access, so too must other groups"). In other contexts, this Court has recognized that like distinctions within a category of speech cannot pass constitutional muster. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (requiring criminals to disgorge profits derived from speech about crime, but not from speech about other topics); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (excluding fighting words on certain disfavored topics, but not others).[8]

Allowing a transit facility such as the MTA to destroy the otherwise "open" status of a forum by regulating within a category of speech would avoid the constitutional imperative

8. *See also Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, No. 96-1829, 1998 U.S. App. LEXIS 13564 (3d Cir. Jun. 25, 1998). Petitioner argued below that the facts of that case were "virtually indistinguishable" from the facts presented here, and relies in this Court on the District Court decision in that case. Pet. 19. Since that argument was advanced, the Third Circuit reversed the District Court, finding that advertising space in subway and commuter rail stations constituted a public forum in which an advertisement within a permitted category of speech could not be excluded without surviving strict scrutiny.

that it justify such exclusion under strict or intermediate scrutiny. Such a bootstrap is a license to engage in viewpoint discrimination. That cannot be a constitutional result.[9]

4. Even assuming *arguendo* that the outside of New York City buses are a nonpublic forum under *Perry*, restrictions imposed must nonetheless be "reasonable in light of the purpose which the forum at issue serves" (460 U.S. at 49) and "not an effort to suppress expression merely because public officials oppose the speaker's view" (*id.*, at 46). As this Court recently emphasized: "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant". *Rosenberger*, 515 U.S. at 829. The restrictions here were neither reasonable nor viewpoint neutral. As discussed above, the record is devoid of *any* purpose for the § 50 regulation, and of any basis for the MTA to single out this particular statute in its Standards. Even assuming a reasonable governmental purpose, the facts of this case, albeit only partially developed due to its procedural status, strongly suggest impermissible viewpoint discrimination. The Advertisement was reviewed weeks in advance and had been approved for publication five weeks before it was summarily pulled at the direct request of the Mayor's office. That Mayor Guiliani did not like the ad was the subject of nightly television coverage for over a week. That the ad is critical or, at least, not

9. Even if the Standards "limit" the forum, the MTA's refusal to display the Advertisement was unconstitutional, because the Advertisement fell precisely within the narrow "contours" of that "limited" forum. By the MTA's own definition, *New York* Magazine paid for space, submitted the Advertisement for screening, and the only court to rule on point found that the Advertisement did *not* violate § 50. Pet. App. 44a-45a. The Second Circuit simply found it unnecessary to reach the § 50 issue. Despite the MTA's unsupported assertion to the contrary (Pet. 4 n.3), there is absolutely no requirement that this Court assume that the Advertisement violated § 50, particularly where the MTA bore the burden of justifying the exclusion under that statute.

complimentary, is self-evident. The MTA does not, and indeed cannot, deny that but for the demands of the Deputy Mayor, the Advertisement would have appeared without hitch. This is strong evidentiary support for the inference of viewpoint discrimination, particularly at the preliminary injunction stage.

III.

THE FIRST AMENDMENT ANALYSIS OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

Likelihood of success on the merits and irreparable injury are the touchstones of a preliminary injunction. In the circumstances here, where neither the MTA nor the Mayor — who is not even a party to the action — could conceivably suffer irreparable injury as a result of the display of the Advertisement, and where *New York* Magazine's First Amendment rights — whether core or commercial — were undeniably impinged, that a preliminary injunction was appropriate cannot be seriously questioned.

In apparent recognition that the facts of *this* case leave no real room for argument — not to speak of presenting an issue worthy of this Court's consideration — the MTA resorts to an interpretation of the Court of Appeals' decision which extends far beyond its actual holding. Thus, petitioner argues that that decision

> means that the MTA lacks the discretion to refuse advertisements in violation of its Standards, even assuming those Standards are substantively valid, without undertaking cumbersome judicial proceedings in which the MTA bears the burden of proof and the standard is strict scrutiny.

Pet. 20. The multiple assumptions underlying this rather extraordinary statement are, at best, suspect.

1. The mere fact that the MTA's refusal to display this Advertisement at the request of the Mayor and in violation of the MTA's own procedures was a prior restraint, does not mean that the MTA cannot refuse *any* advertisement without judicial sanction. The precise holding of the court below is, appropriately, addressed to the specific facts of this case:

> This case aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA. . . . While we accord somewhat lowered scrutiny to government restrictions on the right to propose commercial transactions, protecting the right to express skeptical attitudes toward the government ranks among the First Amendment's most important functions.

Pet. App. 13a-14a (citations omitted).

2. The MTA's entire argument is premised upon the fact that its Standards are "substantively valid". Pet. 20. This is not a facial challenge to the entirety of those Standards: that issue was neither raised below, nor decided by the Court below. *This* case addresses only the standard vesting the MTA with unbridled discretion to refuse an ad on the grounds that it *may* violate § 50, and then, only as applied to a refusal to display this particular Advertisement.

Even if it were in issue, the MTA's assumption of the wholesale validity of its Standards is dubious. Many of the

Standards appear to exclude examples of speech that fall within the broad categories of speech permitted in the forum, and do so in a manner which could not survive First Amendment scrutiny. The absence of procedural safeguards in the Standards compounds the problem: regulations which leave to the unbridled discretion of administrators whether or not a particular advertisement "may" violate the someone's commercial privacy rights under § 50[10] or "may" constitute a penal offense concerning obscenity, are not prime examples of the "precise tailoring" that First Amendment jurisprudence mandates. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58, (1987) ("It is not difficult to visualize a newspaper . . . feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application"); *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965) ("[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

3. Nothing in the Court of Appeals decision requires the MTA to undertake "cumbersome judicial proceedings" in every

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10. This concern for abuse is heightened in the context of § 50 as explained in *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967) (citing *Spahn v. Julian Messner, Inc.*, 18 N.Y. 2d 324, 328, 274 N.Y.S. 2d 877, 879, 221 N.E. 2d 543, 544 (1966), *vacated and remanded*, 387 U.S. 239 (1967) (remanded in light of *Time, Inc. v. Hill*), *aff'd in relevant part on remand*, 21 N.Y. 2d 124, 286 N.Y.S. 2d 832, 233 N.E. 2d 840 (1967), *appeal dismissed*, 393 U.S. 1046 (1969)). And unlike the commercial speech cases petitioner cites upholding administrative orders enjoining false or misleading advertising (Pet. 22), where it might be argued that it is appropriate to defer to the particular agency expertise, no one here has so much as suggested that the MTA has any particular expertise in determining whether an advertisement violates an individual's commercial privacy rights.

instance. This Court has long indicated that administrative review, *with appropriate judicial safeguards*, suffices to protect the attendant First Amendment rights. *Waters v. Churchill*, 511 U.S. 661, 686 (1994) (Scalia, J., concurring); *Freedman v. Maryland*, 380 U.S. at 58-59; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 155 n.4 (1969).[11] Not every administrative proceeding challenging an adverse determination under the Standards will necessitate further judicial action. Likewise, there is nothing either unprecedented or inappropriate about the MTA bearing the burden of proof before exercising its power as a regulator to suppress speech. *See FW/PBS v. Dallas*, 493 U.S. at 225; *Freedman v. Maryland*, 380 U.S. at 60.

4. To the extent that the MTA argues that the prior restraint doctrine only operates in situations of split-second urgency, the argument is not supported in the law. The Nazi Party had to apply for a permit to march, *in advance*, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), a case upon which the MTA relies (Pet. 24). Likewise, the producer of the dramatic production in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), which the MTA urges this Court to disavow (Pet. 24-25),[12] had to apply, *in advance*, for permission

11. The MTA also errs and overstates in claiming "the prior restraint doctrine can have no logical application . . . where the speaker must . . . obtain advance permission to gain access to scarce government resources". Pet. 23. While the government may impose a license or permit requirement in order to regulate competing uses of public fora, it must meet the constitutional requirements in doing so. *Forsyth County v. Nationalist Movement*, 505 U.S. at 128; *see, e.g., Shuttlesworth v. Birmingham*, 394 U.S. at 150-51 ("A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional"); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

12. Petitioner cites *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which held valid city noise control guidelines, in support of its plea that this (Cont'd)

to exhibit its dramatic production in the municipal auditorium.[13] *See also Lakewood v. Plain Dealer*, 486 U.S. at 771. In short, the MTA's "immediacy" requirement for application of the prior restraint doctrine is neither supported by case law nor supportable.

5. To persuade this Court to review this case at this preliminary juncture, the MTA posits a renegade Second Circuit purposefully disregarding limits on the prior restraint doctrine and "evading" precedents of this Court regarding commercial speech. Pet. 7, 20. Neither is the case. Whether the speech in issue here is categorized as core or commercial, it clearly constitutes criticism of government and, on that basis alone, is entitled to full First Amendment protection, including the application of the prior restraint doctrine.[14]

(Cont'd)

Court reexamine *Southeastern Promotions*. Pet. 24-25. But the guidelines at issue in *Ward* were content-neutral and therefore only subject to time, place and manner restrictions on expressive conduct. The MTA has never maintained that its Standards are time, place, or manner restrictions on expressive conduct. Nothing in *Ward* cast doubt on the continuing validity of *Southeastern Promotions* (which concerned exclusion of a category of speech), and which has been cited with approval in recent Supreme Court cases. *See, e.g., National Endowment for the Arts v. Finley*, No. 97-371, 1998 U.S. LEXIS 4211, at *31 (June 25, 1998).

13. Strangely, the MTA argues that "[that] case did not involve the allocation of scarce space among competing uses". Pet. 24. How can it be said that the outside of literally thousands of city buses is less scarce than a single municipal auditorium? Further, the sparse record here is silent as to the number of advertisers competing for that advertising space or the "scarcity" of it.

14. This Court has emphasized that it " 'retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel' for 'public men are, as it were, public property', and

(Cont'd)

The Court of Appeals did not determine whether the Advertisement should be deemed core or commercial speech because it did not need to. But that court noted, as this Court has noted, that the line between core and commercial speech is frequently difficult to draw and is not subject to any "bright-line" test. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring); Pet. 14a. The peculiar facts here amply illustrate the point: the Advertisement contains some elements of fully-protected First Amendment speech including political criticism, humor, and satire, and some elements of commercial speech, as it undoubtedly strives to maximize *New York* Magazine's readership. At a bare minimum, it seems fair to conclude that the commercial and non-commercial messages of the Advertisement are "inextricably intertwined"; therefore, as a mixed message, it must be treated as "pure speech". *See Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795-96 (1988).

Contrary to the MTA's assertion (Pet. 20), this Court has never held that the doctrine of prior restraint does not apply to commercial speech. The very quotes petitioner selects from *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 n.13 (1980), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 771-772 n.14 (1976), (Pet. 20-21), use the word "may" and do not decide

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(Cont'd)
'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled' ". *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 263-64 (1952)). Further, "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office". *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988).

the question. To remove *all* commercial speech from the presumption against suppression that this bedrock First Amendment principle mandates, would be inconsistent with the very philosophy underpinning those few distinctions in protectability of core and commercial speech which the modern Court has been willing to draw. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). For like reason, the MTA errs in concluding that the inapplicability of the prior restraint doctrine is "compelled" by the commercial speech doctrine. Pet. 20. While commercial speech is, under some circumstances, accorded lesser protection than core speech, the rationales articulated for that lesser standard, *i.e.*, the fact that its "hardier" status renders it less likely to be chilled by regulation, and that its greater "objectivity" justifies governmental regulation distinguishing truth from falsity, do not translate into a justification for the wholesale abandonment of the prior restraint doctrine for commercial speech. Certainly, none of those rationales apply to this particular Advertisement.

6. Finally, as to the "extraordinary practical implications" of the Second Circuit decision that the MTA posits, they are totally unsupported in the record. While the MTA may expansively read that decision to require it to display advertisements that it regards as harmful (Pet. 25), no place has the MTA articulated how *this* Advertisement could even "reasonably" be regarded as harmful. The suggestion that displaying this Advertisement would turn the public transit system "into a no-holds-barred pit of frightening, offensive, degrading, unhealthful or illegal images" (Pet. 26) is absurd!

Nothing in the Second Circuit decision "effectively forbids advance determinations of who may purchase advertising space on MTA transit facilities". *Id.* This case illustrates the contrary: the Advertisement was submitted for approval five weeks in advance of scheduled posting. Had the MTA, without the

Mayor's prompting, determined that there was a problem with it, there was more than ample opportunity to secure an advance determination. In any event, similar dire warnings of "administrative nightmares" were urged on this Court and rejected as more theoretical than practical in *Morse v. Republican Party*, 517 U.S. 186, 227 (1996). They should engender no more attention here.

Nor does the Second Circuit decision create "perverse system of incentives" (Pet. 14) forcing the MTA to exclude political advertising or, more draconian yet, cease allowing advertising altogether. Of course, the MTA has the option of doing so. As this Court said in rejecting the same argument when advanced by the U.S. Post Office:

> We have noted that "[t]he United States may give up the Post Office when it sees fit, but while it carries on the use of the mails is as much a part of free speech as the right to use our tongues".

Cincinnati v. Discovery Network, 507 U.S. at 427 (quoting *Blount v. Rizzi*, 400 U.S. 410, 416 (1971)).

If it does anything at all beyond requiring the MTA to display the Advertisement, the Second Circuit decision requires *legitimate* advance regulation of advertising content. The only caveat, and it is a constitutional one, is that such regulation must survive either strict or intermediate scrutiny, as the case may be. Clearly articulated, narrowly-tailored, and procedurally sound standards for legitimate exclusion would allow potential advertisers to plan accordingly, while at the same time protecting their rights and serving the MTA's legitimate, governmental interests. Having dedicated the outside of city buses to all categories of speech, if the MTA wishes to exclude a particular example of such speech, it must justify its actions under

standards which are both precise and constitutional. More to the point in *this* case, the MTA must also follow them.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — BOARD RESOLUTION

BOARD RESOLUTION

WHEREAS, in a Staff Summary, dated March 14, 1994, the Legal Department of the Metropolitan Transportation Authority recommended the adoption of standards set forth in Appendix A hereto (the "Standards") for incorporation into future contracts for the display of advertising on the property and facilities of the Metropolitan Transportation Authority and/or its operating agencies (collectively, the "MTA"); and

WHEREAS, the MTA has a compelling interest in promoting the orderly administration and operation of the MTA transportation system, including the transit system and commuter railroads; and

WHEREAS, the MTA has a compelling interest in maximizing revenues by attracting and maintaining patronage of the MTA transportation system; and

WHEREAS, a substantial number of minors travel on the MTA transportation system, including children who use the MTA transit system as their primary means of transportation to and from school, and the MTA has a compelling interest in protecting such minors from speech that is harmful to them; and

WHEREAS, the MTA has a compelling interest in avoiding the potential identification of the MTA with the viewpoints of advertisers; and

WHEREAS, the MTA has a compelling interest in furthering the interests of MTA patrons in avoiding unwanted and unavoidable confrontations with advertisements that, under

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New York Penal Law § 245.11, are not permitted to be displayed in public places, including transportation facilities;

NOW, THEREFORE, IT IS RESOLVED that, in light of the above and in light of the nature and size of the MTA transportation system, the MTA hereby adopts the Standards for incorporation into future contracts for the display of advertising on MTA properties and facilities; and

IT IS FURTHER RESOLVED that the Standards advance the compelling interests of the MTA identified above.

Dated: March 25, 1994

Appendix A

APPENDIX A: ADVERTISING STANDARDS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY

The following Standards shall apply to all licenses for the installation, display and maintenance of advertising on properties and facilities operated by the Metropolitan Transportation Authority and/or its operating agencies (collectively, the "MTA") executed on or after [March __, 1994].

(a) *Limitations Upon Advertisements.* The licensee shall not display or maintain any advertisement that falls within one of more of the following categories:

(i) The advertisement proposes a commercial transaction, and the advertisement or information contained in it is false, misleading or deceptive.

(ii) The advertisement or information contained in it promotes unlawful or illegal goods, services or activities.

(iii) The advertisement or information contained in it implies or declares an endorsement by the MTA of any service, product or point of view without prior written authorization of the MTA.

(iv) The advertisement contains obscene material. For purposes of this provision, the term "obscene" shall have the meaning contained in New York Penal Law § 235.00 (attached as Exhibit 1), as such provision may be amended, modified or supplemented from time to time.

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(v) The advertisement contains an image or description, which, if sold or loaned to a minor for monetary consideration with knowledge of its character and content, would give rise to a violation of New York Penal Law § 235.21 (attached as Exhibit 2; *see also* Exhibit 3 (New York Penal Law § 235.20 (definitions of terms))), as such provision may be amended, modified or supplemented from time to time.

(vi) The advertisement contains an image or description which, if displayed in a transportation facility with knowledge of its character and content, would give rise to a violation of New York Penal Law § 245.11 (attached as Exhibit 4; *see also* Exhibit 5 (New York Penal Law § 245.10 (definitions of terms))), as such provision may be amended, modified or supplemented from time to time.

(vii) The advertisement, or any information contained in it, is libelous or violates New York Civil Rights Law § 50 (attached as Exhibit 6), as such provision may be amended, modified or supplemented from time to time.

(viii) The advertisement proposes a commercial transaction, and promotes tobacco or tobacco-related products.

(b) *Advertising Standards Committee.* The MTA shall establish a three member Advertising Standards Committee (the "Committee"). The Committee shall

be composed of: one member appointed by the MTA General Counsel, one member appointed by the MTA Director of Real Estate and one member appointed by the MTA Director of Policy and Planning.

(c) *Review of Advertisements.* MTA advertising contractors shall review each advertisement submitted for installation, display and maintenance on MTA properties and facilities to determine whether the advertisement falls within, or may fall within, one or more of the categories set forth in Clause (a) of these Standards. If an MTA advertising contractor determines that an advertisement falls within or may fall within one or more of the categories set forth in Clause (a) of these Standards:

(i) The MTA advertising contractor shall promptly provide the advertiser with a copy of these Standards and written notice of: the determination; the reason(s) for the determination; and the advertiser's right to request a prompt review before the Committee.

(ii) The MTA advertising contractor shall provide the Committee with a copy of the written notice to the advertiser and the advertisement at issue.

(iii) Upon request of the advertiser, the Committee shall conduct a prompt review to determine whether the advertisement at issue falls within one or more of the categories set forth in Clause (a) of these Standards.

(iv) The Committee shall promptly provide the advertiser and the advertising contractor with a written notice of its determination. The Committee's determination shall be final.

(d) If any category set forth in Clause (a) of these Standards is determined to be invalid as applied to any particular type of MTA property or facility, the category shall remain applicable to other types of MTA properties and facilities.

Appendix A

New York Penal Law §235.00

§ 235.00. Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

Appendix A

5. "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. "Simulated" means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. "Sodomy" means any of the types of sexual conduct defined in subdivision two of section 130.00 provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered.

EXHIBIT 1

Appendix A

New York Penal Law §235.21

§ 235.21. Disseminating indecent material to minors

A person is guilty of disseminating indecent material to minors when:

1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

2. Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture show or other presentation.

Disseminating indecent material to minors is a class E felony.

EXHIBIT 2

Appendix A

New York Penal Law §235.20

§ 235.20. Disseminating indecent material to minors; definitions of terms

The following definitions are applicable to sections 235.21 and 235.22:

1. "Minor" means any person less than seventeen years old.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

3. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

6. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

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(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

EXHIBIT 3

Appendix A

New York Penal Law §245.11

§ 245.11. Public display of offensive sexual material

A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, display board, viewing screen, moving picture screen, marquee or similar place, in such manner that the display is easily visible from or in any: public street, sidewalk or thoroughfare[1]; transportation facility[2]; *or any place accessible to members of the public without fee or other limit or condition of admission such as a minimum age requirement and including but not limited to schools, places of amusement, parks and playgrounds but excluding rooms or apartments designed for actual residence;* any pictorial, three-dimensional or other visual representation of a person or a portion of the human body that predominantly appeals to prurient interest in sex, and that:

(a) depicts nudity, or actual or simulated sexual conduct or sado-masochistic abuse; or

(b) depicts or appears to depict nudity, or actual or simulated sexual conduct or sado-masochistic abuse, with the area of the male or female subject's unclothed or apparently unclothed genitals, pubic area or buttocks, or of the female subject's unclothed or apparently unclothed breast, obscured by a covering or mark placed or printed on or in front of the material displayed, or obscured or altered in any other manner.

Public display of offensive sexual material is a Class A misdemeanor.

EXHIBIT 4

Appendix A

New York Penal Law §245.10

§ 245.10. Public display of offensive sexual material; definitions of terms

The following definitions are applicable to section 245.11:

1. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

2. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast.

3. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizzarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

4. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

EXHIBIT 5

Appendix A

New York Civil Rights Law §50

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

EXHIBIT 6